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MICHAEL ROBAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1597

FEDERAL POWER COMMISSION,
Petitioner,

v.

GREENE COUNTY PLANNING BOARD, *et al*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE CITY OF SEATTLE, WASHINGTON, *AMICUS CURIAE*, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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BRIEF OF THE CITY OF SEATTLE, WASHINGTON, AS *AMICUS CURIAE*

The City of Seattle, a municipal corporation of the State of Washington, hereby respectfully requests that the Court favorably consider the petition for a writ of certiorari filed by the Solicitor General.

Interest of the City as *Amicus Curiae*

The City of Seattle, through its Department of Lighting, has operated a municipal electric system since 1905, and presently is the second largest municipally owned electric system

in the United States. The great bulk of the City's power comes from hydroelectric developments owned and operated by it under Federal Power Commission license. These developments include the City's Skagit River Development initially licensed by the FPC in 1927 as FPC Project No. 553. The license for that project has been amended pursuant to FPC procedures some 16 times over the intervening 45 year period, most recently in 1967. Application for another amendment to the license to permit full development of Ross Dam, to provide the City and the Pacific Northwest with badly needed peaking power capability,[1] has been pending before the Federal Power Commission since having been filed by the City in December 1970.[2]

The City has engaged in extensive studies of the environmental consequences of the facilities covered by the pending application and filed an environmental impact statement as required by FPC's Order No. 415 implementing NEPA, with FPC and the Council on Environmental Quality which together with the application, has in turn

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[1] The FPC accurately predicted the perilous status of reserve peaking capacity under which the Pacific Northwest was forced to operate during the winter 1971-1972. FPC Memorandum: Chief, Bureau of Power to the Commission, "1971-1972 Winter Load-Power Supply Situation," p. 5 (Released Nov. 26, 1971).

[2] The proposed amendment seeks authority to construct the fourth and final stage of Ross Dam, which will raise the elevation of Ross Lake from 1602.5 to 1725. Ross Lake was formed when the first stage of the dam was built, and the fourth and final stage now under application was described in the initial filings in 1926. The existing structure incorporates facilities costing over $6,000,000 in contemplation of ultimate fourth stage construction.

been circulated by FPC over a year ago to some 16 other Federal and State agencies for comment. Public notice of the availability of this statement has appeared in the Federal Register. The City in the meantime has continued its environmental studies in order to be fully responsive to environmental concerns expressed by a number of conservation groups permitted to intervene in the FPC proceedings by Order issued by FPC in July of 1971. The hearing which must be held so that the City can evidence these studies through qualified experts, and can cross-examine any adverse testimony which may be offered under oath by intervenors in opposition – to the end that a Hearing Examiner and then FPC itself can reach some decision on a record – is now frustrated by the ruling below in *Greene County*. The consequent delay is a serious one in terms of the City's ability to handle its loads. As the petition of the Solicitor General indicates, the City's application is only one of 193 which are pending relating to the hydroelectric responsibilities of the Commission alone. The City believes the result below to be wrong but on any view of the merits, any protracted delay in the adjudicatory process is intolerable. The Court is accordingly urged to grant certiorari so that the important procedural question may be speedily resolved.

ARGUMENT

I

In *Scenic Hudson Preservation Conference v. F.P.C. (Scenic Hudson II)*, 453 F.2d 463 (2d Cir., 1971), *certiorari denied*, 40 L.W. 3598 (June 20, 1972), the Second Circuit upheld the Federal Power Commission's decision, finding that the Commission's procedures (which were less

demanding than those now in effect) complied with the specific directives contained in Section 102 of the National Environmental Policy Act (NEPA);[3] that the hearings reflected the "systematic, interdisciplinary approach" required by Section 102; and that the environmental statement required by Section 102(2)(C) of NEPA was submitted in the form of the Commission's opinion. The court concluded (at 481):

> . . . In view of the exhaustive environmental findings which occupy a substantial portion of the Commission's opinion, and the Commission's explicit conformance with the enumerated portions of the required statement, we conclude that full compliance with the National Environmental Policy (*sic*) has been demonstrated.

Despite this recognition and approval of the Commission's procedures, in an opinion issued only last October, the January opinion upon which the Government now seeks review would appear to have reversed *sub silentio* the approval of FPC procedures under NEPA clearly given in *Scenic Hudson II*. The opinion below makes frequent approving references to the Second Circuit's decision in *Scenic Hudson I*[4] (Pet. 3a-4a, 11a-12a, 13a, 14a, 20a), but only one passing reference to *Scenic Hudson II* (Pet. 24a).

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[3] 83 Stat. 853 (1970), 42 U.S.C. §4332.

[4] Scenic Hudson Preservation Conference v. Federal Power Commission [Scenic Hudson I], 354 F.2d 608, 614 (1965), cert. denied sub nom. Consolidated Edison Co. of New York v. Scenic Hudson Preservation Conference, 384 U.S. 941 (1966).

Regardless of the effect on *Scenic Hudson II*, the *Greene County* opinion has been strongly and we submit properly criticized as " . . . hair-splitting literalism in applying NEPA which is reminiscent of the technicalities of common-law pleading"[5]

NEPA was not intended to replace the Administrative Procedure Act, nor the procedures which have been developed pursuant to the APA in the daily business of agency adjudication. The statute itself refers to the "*existing* agency review processes" (Sec. 102(2)(c) at least implying that NEPA was not intended to change the decisional or review processes.

Furthermore, the statute's use of terms such as "practicable", "to the fullest extent possible", "appropriate", and "consistent with other essential considerations of national policy"[6] suggests agency discretion in the administration of the Act. This language does not command the inflexible procedural approach which the opinion below would impose.[7]

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[5] Roger C. Cramton, Chairman of the Administrative Conference of the United States, testifying at the recent hearings on NEPA [*Joint Hearings on the Operation of the National Environmental Policy Act of 1969 Before the Senate Comm. on Public Works and the Senate Comm. on Interior and Insular Affairs*, 92nd Cong., 2d Sess., at 418 (1972)].

[6] *See*, e.g. Sec. 101(b), Sec. 102.

[7] *See* Hearings supra n. 5 for Chairman Cramton's view that NEPA is not a "straitjacket" (at 393); that "a large degree of discretion ought to be accorded different agencies as to how they meet [the existing agency review processes] requirement" (at 393); and that " . . . too heroic a notion of what decisionmakers have to go through to make individual decisions, will cripple or impair the Federal decisionmaking process." (at 391).

II

The decision of the court below conflicts with Section 10(e) of the Guidelines of the Council on Environmental Quality (CEQ), 36 Fed. Reg. 7724 (April 23, 1971) which provide that no draft impact statement need be issued prior to a hearing in those instances ". . . where the agency prepares the draft statement on the basis of a hearing subject to the Administrative Procedure Act and preceded by adequate public notice and information to identify the issues and obtain the comments provided for in sections 6-9 of [the] guidelines". It is noteworthy that Section 7 of the Guidelines thus referred to also cites to the APA, noting that agencies "considering an action requiring an environmental statement" should consult with and obtain the comment of other Federal agencies having some jurisdiction or special expertise in the subject matter:

> . . . on the basis of (i) a draft environmental statement for which it takes responsibility or (ii) comparable information followed by a hearing subject to the provisions of the Administrative Procedure Act . . .

FPC has scrupulously followed these CEQ Guidelines in connection with Seattle's currently pending application with the important and critical exception that the holding of the APA hearing has been stalled as a consequence of the opinion below.

While it may be correct that these CEQ guidelines are "merely advisory", as the court below notes (455 F.2d 412, Pet. 16a), the Council's interpretation of NEPA should certainly be shown some deference,[8] especially

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[8] Udall v. Tallman, 380 U.S. 1, 16 (1965). See also Rosado v. Wyman, 397 U.S. 397, 415 (1970); United States v. Leslie Salt Co., (continued)

since CEQ has been entrusted by Section 204(3) of NEPA with the responsibility:

> (3) to review and appraise the various programs and activities of the Federal Government in the light of the policy set forth in title I of the Act for the purpose of determining the extent to which such programs and activities are contributing to the achievement of such policy, and to make recommendations to the President with respect thereto.

In paragraph 12 of the Guidelines themselves CEQ stipulates that it will issue such supplements to its Gudelines as necessary "after examining environmental statements and agency procedures with respect to such statements . . . " We are aware of no supplements by CEQ with regard to FPC procedures let alone any recommendation by CEQ which would require the drastic alteration to the Commission's procedures which the opinion below would impose. Such a change, which would in effect require the Commission staff to take a position focused on the immediate environmental concerns of an application, without any reference to the need for the project involved, all prior to a presentation of the evidence, would appear to

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[8] (continued) 350 U.S. 383, 396 (1956). Citing the last case the court in Environmental Defense Fund v. Corps of Engineers, 325 F. Supp. 728, 744 (E.D.Ark., 1971), referring to CEQ's guidelines, stated that such administrative interpretation cannot be ignored except for the strongest reasons. *See* to the same effect Environmental Defense Fund v. T.V.A., 339 F. Supp. 806, 811 (E.D. Tenn., 1972), " . . . particularly where the interpretation is a construction of a statute by the men designated by the statute to put it into effect."

deny all parties involved, as well as the applicant, the procedural due process which the Administrative Procedure Act was enacted to achieve.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted and the decision of the court below reversed.

Respectfully submitted,

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August 3, 1972